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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

No. 461

WILLIAM GREENOUGH AND
GEORGE HENRY WARREN, JR., Trustees,
Appellants,

v.

TAX ASSESSORS of The City of Newport; and
EDWARD L. LEAHY, Tax Administrator of the State of Rhode Island,
Appellees

BRIEF FOR APPELLEES

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Appellees

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BRIEF FOR APPELLEES

OPINIONS BELOW

The opinion of the Superior Court of the State of Rhode Island, from which the appeal to the Supreme Court of the State of Rhode Island was taken, appears in the Record at pages 34 to 37. This opinion has not been reported. The opinion of the Supreme Court of Rhode Island (R. 39) is reported in 71 R. I. 477, 47 Atlantic Reporter, 2d, 625.

JURISDICTION

This case is upon appeal from the Superior Court of Rhode Island under Section 344 of Title 28 of the United States Code, which is Section 237 of the Judicial Code, on the ground that there was drawn into question the validity of a statute of the State.

The case below is reported in 47 A. 2nd, 625.

QUESTIONS PRESENTED

Whether, under the provisions of sub-division Fifth of Section 9 of Chapter 30 of the General Laws of Rhode Island of 1938, George Henry Warren, Jr., a domiciled resident and inhabitant of the City and County of Newport, State of Rhode Island, one of two trustees, can be taxed as trustee on one-half of the intangible trust property, a trust created under the will of George Henry Warren who was a resident of New York, his co-trustee being a resident of New York and the cestui que trust being a resident of New York.

STATUTE INVOLVED

The statute involved (General Laws of Rhode Island, 1938, Chapter 30, Section 9, Subdivision Fifth) imposes an ad valorem tax as follows:

> "FIFTH. Intangible personal property held in trust by any executor, administrator, or trustee, whether under an express or implied trust, the income of which is to be paid to any other person, shall be taxed to such executor, administrator or trustee in the town where such other person resides; but if such other person resides out of the state, then in the town where the executor, administrator, or trustee resides; and if there be more

than one such executor, administrator or trustee, then in equal proportions to each of such executors, administrators, and trustees in the towns where they respectively reside."

The tax assessed is as follows:

"Warren, George H. Jr. Trustee u/w of George H. Warren for Constance Whitney Warren. Intangible Personal Property, $12,500. Tax $50." (R. 3, 14).

The uncontradicted evidence shows that, according to information given the Tax Assessors of Newport, prior to the above assessment, by William P. Sheffield, Attorney as the representative of the trustee, George Henry Warren, Jr., $12,500 was one-half of the sum held by the trustees on the date of the assessment as the then corpus of the aforesaid trust created under the fifth and sixth clauses of the testator's will (R. 27), Opinion of the Supreme Court (R. 40).

The trustees paid the tax under protest alleging that the assessment was in violation of Article IV, Section 2, of the Constitution of the United States (R. 32-33).

STATEMENT

The facts are undisputed. (R. 1-5)

SUMMARY OF ARGUMENT

Appellees' contentions may be briefly summarized as follows:

The application of the tax statute to the facts in this case is not unconstitutional and is not in contravention of the provisions of the Fourteenth Amendment.

ARGUMENT

I. CONSTITUTIONALITY

The application of the tax statute to the facts in this case is not unconstitutional and is not in contravention of the provisions of the Fourteenth Amendment.

> "The power to tax is an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a state extends, are objects of taxation . . ."
>
> *State Tax Commission of Utah v. Aldrich*
> 316 U. S. 174; 86 L. Ed. 1358
>
> "Nothing can be less helpful than for courts to go beyond the extremely limited restrictions that the Constitution places upon the states and to inject themselves in a merely negative way into the delicate processes of fiscal policy-making. We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalization exceeding the concrete circumstances which they profess to summarize."
>
> *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435 85 L. Ed. 267; 130 ALR 1229 (P. 1233)
>
> "The Fourteenth Amendment does not, in terms or in effect, prohibit unwise taxes, merely because

they are unwise or unfair or burdensome taxes, merely because they are unfair or burdensome.

International Harvester Co. v. Wisconsin Dept. of Taxation, 322 U. S. 435 (444), 88 L. Ed. 1373 (1381)

In *Magnano Co. v. Hamilton*, 292 U. S. 40, 78 L.Ed. 1109, 54 S. Ct. 599, it is asserted that "The due process clause of the Fourteenth Amendment is not a limitation upon the taxing power of the states except in rare and special instances".

In 51 Am. Jur. Sec. 92, under the heading of *TAXATION*, various cases on this subject are digested as follows:

"While it is clear that the exaction by a state of a tax which it is without power to impose is a taking of property without due process of law in violation of the Fourteenth Amendment of the Federal Constitution, a particular tax law or administrative interpretation or application thereof will not be struck down as a violation of the Fourteenth Amendment unless the state's action is palpably arbitrary or grossly unequal in its application to the persons concerned results in such flagrant and palpable inequity between the burden imposed and the benefit received as to amount to the arbitrary taking of property without just compensation; or is so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but is in substance and effect a direct exertion of different and forbidden power, such as the confiscation of property. Where a state's power of taxation is properly exercised, it seems clear that any taking of property thereunder does not con-

stitute a taking without due process of law. It has been said that the test of whether a tax law violates the due process clause is whether it bears some fiscal relation to the protection, opportunities, and benefits given by the state, or in other words, whether the state has given anything for which it can ask a return. Due process of law does not assure to a taxpayer the interpretation of state legislation by the executive officers of a state as against its interpretation by the courts of the state, or relief from the consequences of a misinterpretation by either. A state tax is not violative of the Fourteenth Amendment merely because of the oppressiveness of the exaction, where the method of imposing the tax is not unconstitutional. (Numerous cases cited to support each statement.)

In *Wisconsin v. J. C. Penney Co.*, Supra, the Court states:

"That (the) test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction".

"This analysis is merely a reformulation of the classic approach of this court to the taxing power of the states. (*Lawrence v. State Tax Commission*, supra (286 U. S. 280, 76 L. Ed. 1105, 52 S. Ct. 556, 87 ALR 374). Ambiguous intimations of general phrases in opinions torn from the significance of concrete circumstances, or even an occasional deviation over a long course of years, not unnatural in view of the confusing complexities of tax problems, do not alter the limited nature of the function of this court when state taxes come before it. At best, the responsibility for devising just and productive sources of revenue challenges the wit of legislators. Nothing can be less helpful than for courts to go beyond the extremely limited restrictions that the Constitution places upon the states and to inject themselves in a merely negative way into the delicate processes of fiscal policy making. We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalization exceeding the concrete circumstances which they profess to summarize".

In the annotation to the Penney case, at p. 1237 of 130 ALR, it is stated:

The court in sustaining the tax applied the simple test of whether protection, opportunity, or benefit was given by the state and received by the taxpayer in return for the tax, as the guiding criterion to sustain or defeat a tax under the due process clause, without strict adherence to the designation or description of the tax or other formulae as to taxable

event, taxable situs, jurisdiction to tax or business situs ,etc., not in terms found in the Constitution, but merely constituting judicial generalizations to express mere results in applying the true constitutional test of a state's right to tax; and concluded that the substantial privilege of carrying on business in Wisconsin which had been given to the foreign corporation clearly supported the tax, and that the state had not given any the less merely because it had conditioned the payment of the tax upon happenings (declaration of dividends) outside its own borders".

In the Dorrance case, 3 Atl. 2nd 682, 333 Pa. 162: 127 ALR 366, shown on pages 14, 20 and 21 of Appellants' brief, the court also said:

(127 ALR, page 370) "The learned court below recognized that the Trustees held by joint tenancy but, apparently treating them as tenants in common concluded that 'the undivided three-quarters interest in the trust assets held by individual residents of the State of Pennsylvania is taxable under the . . . . statute'. The legislature has not attempted to authorize a division of the joint tenancy title. It is quite apparent from the amendment * (5) to the Act (if we may refer to it) made by the same legislature at the special session of 1936, that it had no intention, when it passed the Act in 1935, to tax to resident trustees of foreign held trust property, because the Amendment provides for the taxing to resident beneficiaries of equitable interests in foreign trusts. Without now considering the power of the legislature as exercised, the amendment taxing beneficial interests would seem to indicate that the legislature thought

it had not already taxed the same property in the trustee's hands".

* (5) "The amendment passed at the first extra session of 1936, P.L. 51, 72 P.S. Sec. 3244, amends Sec. 3 by adding in the first paragraph as taxable property . . . . the equitable interest in any such personal property of the classes hereinafter enumerated, owned, held or possessed by any resident, where the legal title to such personal property is vested in a trustee, agent, or attorney in fact domiciled in another state, and where such resident is entitled to receive all or any part of the income therefrom . . . . "

"To the last paragraph of Section 3, the following was added: "The value of the equitable interest in any personal property, made subject to tax by this section, shall be measured by ascertaining the value of the personal property in which such resident has the sole equitable interest, or in case of divided equitable interests in the same personal property, then by ascertaining such part of the value of the whole of such personal property as represents the equitable interest of such resident therein".

The Dorrance case cannot be considered as an authority because

(a) The Pennsylvania statute did not provide, as does the Rhode Island Statute, for apportionment of the tax between the trustees.

and

(b) The reasoning of the Pennsylvania Court's decision is clearly that an amendment to the

Pennsylvania statute (shown above) providing for taxing of the cestuis indicated the legislative intent not to tax the trustee. It is fair to state that if it were not for the amendment to the statute, the court would not have arrived at the decision rendered.

Furthermore, it must not be overlooked in the Dorrance case that a dissenting opinion was rendered by Mr. Justice Maxey, and a careful reading of this opinion, it is believed, will convince the Court that the reasoning in the dissenting opinion is more sound and reasonable, and in the Dorrance case, the syllabus (4) plainly states (127 ALR 366):

"4. That a state statute providing for the taxation of any resident of the state on personal property held as trustee was not intended to apply in the case of resident trustees of foreign trusts is indicated by an amendment made by the same legislature at a subsequent session, providing for the taxation to resident beneficiaries of equitable interests in foreign trusts".

In 67 ALR, at Page 402, in a note to the annotation in the case of *Safe Deposit and T. Co., v. Virginia*, 280 U. S. 83, it is stated:

"So, an assessment jointly against two trustees, one a resident, and one a non-resident of the State, is void as to the non-resident, and the resident is assessable only to the extent of one half of the value of the assets of the trust. *People ex rel. Kellog v. Wells* (1905) 182 N. Y. 314, 74 N. E. 878 (reversing the same case in the Appellate Division

(1905) 101 App. Div. 600, 92 N. Y. Supp. 5). From the report of the case below it would appear that the trust was created by a will of a resident of N. Y., but that the trust securities were in New Jersey, at the time of the assessment, and not in New York".

In 51 Am. Jur., Sec. 484, it is stated that:

"In the case of several trustees who are residents of different states, the tax in each state is ordinarily apportioned to the number of trustees therein resident. Anno. 67 ALR 400; 127 ALR 379".

The trustee is the owner, for the purposes of taxation, of the property held in trust by him. *Green v. Mumford*, 4 R. I. 313 (319); *Anthony v. Caswell*, 15 R. I., 159 (161).

Whether or not the person taxed receives any direct benefit from the tax is not the test by which the constitutionality of a taxing act can be determined; instances are numerous in which the individual taxpayer receives and can receive no direct benefit. . . . from the tax. *Wood v. Quimby*, 20 R. I., 482 (490)

In *Blodgett v. Silberman*, 277 U. S. 1; 72 L. Ed. 749 (757) it was stated:

"At common law the maxim mobilia sequuntur personam applied. There has been discussion and criticism of the application and enforcement of that maxim, but it is so fixed in the common law of this country and of England, insofar as it relates to intangible property, including choses in action

without regard to whether they are evidenced in writing or otherwise and whether the papers evidencing the same are found in the state of the domicile or elsewhere, and is so fully sustained by cases in this and other courts, that it must be treated as settled in this jurisdiction whether it approve itself to legal philosophic test or not.

Further, this principle is not to be shaken by the inquiry into the question whether the transfer of such intangibles, like specialties, bonds, or promissory notes, is subject to taxation in another jurisdiction. As to that we need not inquire. It is not the issue in this case. For present purposes it suffices that intangible personality has such a situs at the domicil of its owner that its transfer on his death may be taxed there".

In *Price v. Hunter*, 34 Fed. 355 (Pa. 1888) the Court said:

"Property held by a trustee in the state, for the benefit of another is subject to tax, irrespective of the domicile of the beneficiary.

The title to, and the possession of, the corpus of a fund being in the trustee, in the absence of statutory provisions to the contrary, its situs, for the purpose of taxation, is at the domicil of the trustee, and the fact that the beneficiaries of the trust are non-residents does not prevent the application of the general rule. (Citing numerous cases in annotation 67 ALR 393-403; also 127 ALR 379).

In *Curry v. McCanless*, 307 U. S. 357; 83 L. Ed. 1339, the Court said:

> "'Intangibles, consisting of rights not related to physical things, are merely relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in the courts.
>
> An adequate constitutional basis for imposing on a citizen of a state a tax on the use and enjoyment of rights in intangibles measured by their value is found in the state's control over the citizen at the place of his domicil, and his duty there, common to all citizens, to contribute to the support of the government of the state.
>
> The state in which an owner of intangibles has his domicil cannot be deprived, by reason of the owner's activities elsewhere, of its constitutional jurisdiction to tax such intangibles.
>
> The Fourteenth Amendment does not require the fixing of a single exclusive place for the taxation of intangibles.
>
> The due process clauses of both the Fifth and Fourteenth Amendments are directed at the protection of the individual, and he is entitled to their immunity as much against the state as against the national government.
>
> Legal ownership of intangibles in a state by a trustee located in that state affords adequate constitutional basis for imposing on the trustee a tax measured by the value of such intangibles, and the Fourteenth Amendment does not relieve the trustee from the obligation to pay such a tax."

It was held in *People ex rel Beman v. Feitner* (1901) 168 N. Y. 360, 61 N. E. 280:

> "that where two of the three trustees under the will of a New Jersey testator were domiciled in New York, the third being a non-resident, each of the resident trustees was assessable in the taxing district in which he resided, upon one third of the trust fund, consisting of securities on deposit with a safe-deposit company in New Jersey, the beneficiaries being nonresidents of New York. This decision reversed the judgment of the appellate division in (1901) 63 App. Div. 174, 71 N. Y. Supp. 261".

It was held in *Welch v. Boston* (1915) 221 Mass., 155, 109 N. E. 174:

> "the exclusive legal title to trust property is vested in the trustee. Certificates of stock, apart from express statute, have never been regarded as capable of acquiring a situs independent of the domicile of the owner and of the corporation whose fractional ownership they represent. The maxim that they follow the person of their owner as to situs has its foundation not only in convenience but in the practical necessities of business.
>
> Generally speaking intangible property . . . may be regarded for the purposes of taxation as situated at the domicile of the owner and within the jurisdiction of the state where he has such domicile. A tax upon such property to the owner at his domicile, in accordance with the state statute 'violates no provision of the Federal Constitution' ". *Buck v. Beach*, 206 U. S. 392, 401, 27 Sup. Ct. 712, 51 L. Ed. 1106, 11 Ann Cas 732. *

"Even in the light of the most recent decisions domicile of the owner usually fixes the situs of personal property, for purposes of taxation, even as to classes described as tangible, unless it has become permanently located in some other jurisdiction and, so far as adjudiciations go, is also employed in the prosecution of business there. *Southern Pacific Co. v Kentucky*, 222 U .S. 63, 74; 32 Sup Ct. 13, 56 L. Ed. 96. See 15 Columbia Law Review, 377.

"Upon this aspect of the case the contention is that the owners of stocks and bonds may establish an independent situs for the purpose of their taxation, different from the domicile of the owner, the debtor or the corporation issuing the stock, by a simple deposit of them in a foreign state, and thereby divest the jurisdiction of their domicile of the right to tax. Without undertaking to say what effect such deposit may have on the taxing power of the state of deposit, see *Wheeler v. New York*, 233 U. S. 434, 439, 446, 34 Sup. Ct. 607, 58 L. Ed. 1030, it seems to us that the power of the state of their domicile to tax them is not affected.

"If it be said that governmental protection is the consideration for taxation (*Diamond Match Co. v. Ontonagon*, 188 U.S. 82, 90; 23 Sup.Ct. 266, 47 L.Ed. 394; *Union Transit Co. v.Kentucky*, 199 U. S. 194, 202, 26 Sup. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493), there is still support for the tax. The plaintiffs would be given whatever protection they as owners might require from our government, and they doubtless could be held by our courts to the performance of their trusts at the suit of their cestuj qui trustent or other interested parties.

"'The natural method of dealing with the taxation of invisible and intangible property is to treat with the owner where he lives, where he can be reached and where it is comparatively easy to administer with justice the law. Any other course seems to open wide the door to evasion of all taxation . .

"For these reasons no right secured to the plaintiffs by the Fourteenth Amendment to the Constitution of the United States or by our own Constitution is violated by the statute as thus interpretated. This conclusion is supported in principle by *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. Ed. 558 (and numerous other cases cited)".

The facts in the Welch case were substantially as follows: Plaintiffs sought to recover from the City of Boston amount of taxes paid under protest. The plaintiffs were trustees appointed by the Probate Court of York County in the State of Maine, under the will of a testatrix who was domiciled in that County and State. All the beneficiaries under the trust were domiciled in the State of California. The corpus of the trust fund, so far as concerned the tax in question, consisted of stocks and bonds of corporations foreign to the Commonwealth of Massachusetts. These bonds and certificates of stocks always were deposited and kept in the State of Maine. The question was whether such property was legally assessable to the plaintiffs who were domiciled in Massachusetts. It was held that the assessment under the statute was valid and that no right secured to the plaintiffs by the Fourteenth Amendment to the Constitution of the United States or by the Constitution of Massachusetts was violated by the Statute.

In *Safe Deposit & Trust Co. of Baltimore v. Commonwealth of Virginia*, 280 U. S. 83; 74 L. Ed. 180; 67 ALR 386 (annotation 390), it was stated that:

> "Ordinarily this court recognizes that the fiction of mobilia sequuntur personam may be applied in order to determine the situs of intangible personal property for taxation." *Blodgett v. Silberman*, 277 U. S. 1, 72 L. Ed. 749, 48 Sup. Ct. Rep. 410.

In *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. Ed. 558, the Court said:

> "So long as a State, by its laws prescribing the mode and subject of taxation, does not intrench upon the legitimate authority of the Union, or violate any right recognized or secured by the Constitution of the United States, this Court, as between the State and its citizen, can afford him no relief against state taxation, however unjust, oppressive or onerous".
>
> "This vital power," said this court in *Bk. v. Billings*, 4 Pet., 563, "may be abused; but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the State Governments. The interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security, when there is no express contract, against unjust and excessive taxation, as well as against unwise legislation."

In *St. Louis v. Ferry Co.*, 11 Wall., 423, 20 L. Ed., 192, and in State Tax on Foreign Held Bonds, 15 Wall., 300, 21 L. Ed., 179, the language of the court was equally emphatic, viz:

> "unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction".

II. CONCLUSION

The Rhode Island statute follows the common rule in taxing the trust property to the trustee. In *Anthony v. Caswell* (1885) 15 R. I., 159, the court in construing substantially the same statute with which this court is now concerned had before it a set of facts which is almost exactly opposed to the present case. In the cited case the trustee rsided in New York and the cestui resided in Rhode Island. Residence in Rhode Island of the *cestui* was held *not* to confer authority to tax the trust fund to an out-of-state trustee. And the court stated:

> "The statute, *following the common rule* clearly recognizes executors, administrators and *trustees* as the owners, *for the purpose of taxation* of the property held in trust by them".

(1) Only one-half of the fund was taxed to the resident trustee.

The provision of the Rhode Island Statute providing for apportionment where there is more than one trustee was strictly followed by the appellees. Note also that the information upon which one-half of the securities forming the trust fund was taxed to the resident trustee came from his own representative (R. 27) and the assessment was made in accordance with the resident trustee's own feelings in the matter (R. 27).

The Massachusetts case (*Newcomb v. Paige*, 224 Mass. 516, Appellant's Brief, pp. 10, 12 and 19) is no authority for appellants because the Massachusetts statute does not correspond to the Rhode Island Statute, and further that decision was based upon the final sentence of Clause 5 of Section 23 of the Tax Act, viz:

> "The final sentence of the clause, to the effect that when the trustee is not a resident of this Commonwealth, the fund shall be assessed to the person to whom the income is payable, in the place where he resides, if it is not legally taxed to . . . trustee under a testamentary trust in any other state', is some indication of a legislative purpose that a trust fund lawfully within the taxing jurisdiction of another state and there making a just contribution to the support of government, should not be made liable to another tax here".

The Newport trustee because of his residence is entitled to all the protection the State of Rhode Island affords to the legal owner of property. That such residence is an ample basis for the imposition of the tax was upheld by the Supreme Court of Rhode Island as long ago as 1891 in *Ailman and Honey*, 17 R. I., 362.

Even though the Massachusetts tax statute in the case (*Newcomb v. Paige, supra*), contained a provision for apportionment, that statute differed from the Rhode Island statute, and the Massachusetts Court in construing its statute based its decision upon the legislative intent as found by the court, not to tax the trust fund, *if it involved double taxation* Nothing could be clearer, from the court's calling attention to the non-taxability of a *beneficiary* under clause 5 of Section 23 of the Massachusetts Tax Act where the trust fund was legally

taxable in another state, than that the court discovered a legislative intention *not* to tax to a Massachusetts co-trustee a portion of an out-of-state trust fund taxable elsewhere. In other words, the court found that the Massachusetts legislature had forbidden double taxation. This is the opposite of the finding of the Rhode Island Court on the Rhode Island statute in petition of *Ailman and Honey*, supra, where the Court construed the provision of the Rhode Island tax statute which is concerned in this case to apply to out-of-State trusts and said (p. 364):

> . . . . if it (the trust fund) be thus liable to double taxation, here and elsewhere, that has to do with the policy of the law, over which we have no control . . . . "

The well-settled construction of the statute is that it applied to a resident trustee of an out-of-state trust.

The law of Petition of *Ailman & Honey*, supra, has been the law of Rhode Island since 1891. Honey, a resident of Newport, Rhode Islar 1, was appointed by the South Carolina courts as trustee of a South Carolina trust estate constituted under the will of a South Carolina resident decedent. The beneficiary was a New York resident. Honey invested some of the trust fund in mortgages on Newport real estate. A tax was assessed to Honey upon the intangible property so held and the trustee raised the question that the statute should be construed as applying "only to property of decedent inhabitants of the State" (p. 364). The court decided that both the explicit language of the statute and its intent caused it to apply to a resident trustee of an out-of-state trust fund, and upheld the tax. In so construing the statute, the court stated unmistakably that the resi-

dence in this state of the legal owner of the intangibles was sufficient, *in and of itself*, to give a taxable situs within Rhode Island to the intangibles:

> " . . . In the case before us, the legal owner resides here, and he has invested a part of his trust estate here; so that the situs of the property is doubly fixed. The fact that the authority of the trustee comes from another state *does not change the fact of his residence and legal title within this state; nor the fact that the property taxed is here*, by reason of its investment in loans secured by mortgages within this state, which run to the trustee".

The Rhode Island Statute construed in the Ailman case was practically the same as the statute under consideration in the instant case.

(3) Subsection Fifth of Section 9, Chapter 30, of the General Laws of Rhode Island 1938 is constitutional under both the Rhode Island and Federal Constitutions.

(a) The statute follows the common rule in assessing the tax to the trustee.

> "In the absence of a statute, the law would look upon the trustee as the owner, and assess the property at his domicile. If there are two or more trustees residing in different places, the tax is divided, the trustees being treated as equal owners . . . "Perry on Trusts and Trustees, Seventh Ed., Vol. 1, Sec. 331, p. 575, citing, among others, Green v. Mumford, 4 R. I. 313".

(b) The statute taxes to a resident trustee of an

out-of-state trust only his proportionate part of the trust fund.

Although the Rhode Island statutes provide that trustees shall hold the trust property as joint tenants (Chapter 431, Section 1 of the 1938 General Laws), a division of that joint tenancy title for purposes of *taxation* is authorized by the said Subsection Fifth of Section 9, Chapter 30 of the 1938 General Laws. Contrary to the Pennsylvania statute construed in Dorrance's Estate (cited supra), our statute *does* direct that if there is more than one trustee, *only his proportionate part* of the trust fund shall be taxed to each one. This is a reasonable and equitable procedure. It would be unfair to tax to the resident trustee (or trustees) all the trust property where there is a non-resident trustee (or trustees). The statute here, too, follows the common rule. (See quotation, cited supra, from "Perry on Trusts").

(c) The right of more than one state to tax intangible property has been enunciated and reaffirmed by the latest decisions of this Court.

Certain it is that if an owner of intangible property extends his activities with respect to his intangibles so that states other than his domicile give some measure of protection or benefits to his property, he is not thereby relieved of taxation for it at his domicile. (See *Curry v. McCanless*, supra, at p. 367):

> " . . . whether we regard the right of a state to tax as founded on power over the object taxed . . . through dominion over tangibles or over persons whose relationships are the source of intangible rights; or on the benefit and protec-

tion conferred by the taxing sovereignty, or both, it is undeniable that *the state of domicile is not deprived, by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax*, and consequently that there are many circumstances in which more than one state may have jurisdiction to impose a tax and measure it by some or all of the taxpayer's intangibles".

(4) The State of Rhode Island extends to the resident trustee in the instant case benefits and protection accorded to any resident legal owner of intangible property.

The claim of appellants that the State of Rhode Island has no "jurisdiction to tax" because the resident trustee and the trust property receive no benefits or protection from the State of Rhode Island is difficult to understand. In the concurring opinion in *State Tax Commission of Utah v. Aldrich*, supra: (p. 183), it was said:

" . . . . that phrase (jurisdiction to tax) obscures rather than enlightens, *for it only states a result* and does not analyze the constitutional problem".

It is a legal conclusion only. The appellants purport to arrive at the decision that Rhode Island has no "jurisdiction to tax" by alleging that the resident trustee and the trust fund receive no benefits or protection from the state. But the resident trustee receives benefits and protection accorded *any resident, legal owner of intangible property*.

THE ASSESSMENT SHOULD BE SUSTAINED.

IT WAS NOT ILLEGAL NOR IN VIOLATION OF ARTICLE XIV OF THE AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF RHODE ISLAND SHOULD BE AFFIRMED.

Respectfully submitted,

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Appellees

Newport, R. I.
January 21, 1947.